

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-000538-MR

CHARLES SALYERS

APPELLANT

v.

APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 04-CR-00075

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: HOWARD AND MOORE, JUDGES; GUIDUGLI,¹ SENIOR JUDGE.

MOORE, JUDGE: Charles Salyers was convicted, in Greenup Circuit Court, on one count of rape in the first degree and was sentenced to ten years' incarceration. Now, Salyers appeals the judgment of conviction and argues that the Greenup Circuit Court erred regarding the admissibility of certain expert testimony and erred by failing to instruct the jury on lesser included offenses. After reviewing the record and considering the arguments of the parties, we affirm Salyers's judgment of conviction.

¹ Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

I. FACTUAL AND PROCEDURAL BACKGROUND

On a Friday evening, W.M., a fourteen year old girl, went to the home of Charles Salyers to spend the night with Salyers's daughter, Samantha. After spending the evening bowling with Salyers and his family, W.M. returned to Salyers's residence around 11:30 pm. Although most of the Salyers family had gone to bed upon returning, Salyers, Samantha and W.M. remained awake, talking in the kitchen. According to W.M.'s subsequent testimony, some time after midnight, Salyers gave a beer to both underage girls. W.M. testified that after she drank four beers, she and the others adjourned to the living room where they continued to drink and talk for another two and a half hours. Eventually, Samantha went to the bathroom. W.M. testified that while Samantha was gone, Salyers moved close to W.M., pulled the ponytail holder from her hair and allegedly told her that she looked prettier with her hair down. As soon as Samantha returned, Salyers quickly moved away from W.M. According to W.M., Salyers's behavior made her uncomfortable.

W.M. testified that, some time after this alleged incident, she passed out. According to W.M., at approximately 3:30 am, she awoke and found Salyers on top of her. At trial, W.M. insisted that, at that time, she felt discomfort in her vagina and realized that Salyers was raping her. When questioned, W.M. testified unequivocally that Salyers had his penis inside her vagina. According to W.M.'s testimony, she told Salyers to get off her and told him no; however, she claimed that she could neither yell nor

scream. W.M. testified that Salyers held her hands down but that he never hit her. Furthermore, she claimed that she managed to escape from him but she only made it as far as the couch before he pulled her down to the floor and continued to rape her. According to W.M., she eventually passed out again because she was still feeling the effects of the alcohol.

After W.M. awoke the next morning, she went home and, subsequently, told her mother about the sexual assault. W.M.'s mother took the girl to a local hospital, and, while there, the police were contacted. At the behest of the police, W.M.'s mother took W.M. to a facility known as Hope's Place where W.M. was examined by a sexual assault nurse examiner. After the police investigated the incident, Salyers was indicted and charged with rape in the first degree, Kentucky Revised Statute (KRS) 510.040.²

In January 2006, Salyers proceeded to trial on the rape charge. At trial, the Commonwealth called Juanita Napier to the stand to testify as an expert. Napier was the sexual assault nurse examiner who had examined W.M. after the alleged rape. Salyers objected and argued that Napier was not qualified to testify as an expert and that her proposed testimony was not reliable. The trial court held a hearing, pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993), outside the presence of the jury regarding Salyers's objection to Napier's proposed testimony.

During the *Daubert* hearing, Napier testified, during direct examination, that she had graduated from a two year nursing program at King's Daughter Hospital, a

² Salyers was also indicted and charged with unlawful transaction with a minor in the first degree, KRS 530.064. However, this charge was later dismissed.

local hospital. To qualify as a sexual assault nurse examiner, Napier explained that she underwent forty hours of didactic training, which consisted of specialized training in the area of sexual assault cases. Napier testified that, upon completing this training, the Commonwealth of Kentucky certified her as a sexual assault nurse examiner. Furthermore, Napier testified that she was required to take continuing education courses to maintain her certification.

After testifying regarding her qualifications, Napier testified regarding the examination that she performed on W.M. According to Napier, she began the examination by interviewing W.M. about the sexual assault. After interviewing W.M., Napier conducted a physical examination of W.M. and, according to her testimony, she did not find any bruises, scratches or scrapes. After the physical examination, Napier conducted a perineal examination. Napier testified that she used toluidine dye and a culpascope to examine W.M.'s perineal area. According to Napier, the use of toluidine dye would reveal tears not ordinarily visible to the naked eye. Napier testified that the use of toluidine dye was generally accepted in the medical community and normally used in sexual assault cases to reveal tears. Napier explained that, through the use of the dye and culpascope, she observed a tear on the outside of W.M.'s vagina. Napier opined that the tear was twenty-four hours or less old. According to Napier, the perineal area has a good supply of blood which promotes quick healing. Because the tear had not yet started to heal, she opined that the injury was fresh. According to Napier's opinion, the tear was

consistent with sexual assault or rough sex. Napier testified that this opinion was based on scientific training and knowledge.

Upon cross-examination, Salyers asked what studies Napier relied on in reaching her opinions, and she replied none. However, she explained that she relied on her training. Salyers asked Napier if any learned treatises had been written regarding the use of toluidine dye, and she replied that she did not know. Salyers then asked for the name of any expert who recognized the use of toluidine dye as accepted in the medical community, and she answered that she did not know.

After cross-examination, the Commonwealth asked Napier on redirect whether the use of toluidine dye was a novel technique that she had devised, and she replied no. According to Napier, toluidine dye was used nationwide. Napier then reiterated that the use of both toluidine dye and culpascopes had been part of her training in order to be certified by the Commonwealth as a sexual assault nurse examiner. The Commonwealth asked if Napier had testified as an expert in other cases, and she replied that she had and that her testimony had been admitted.

After Napier had testified and after the Commonwealth and Salyers had presented their respective arguments, the trial court determined 1) that Napier was qualified to testify as an expert, 2) that, pursuant to *Stringer v. Commonwealth*, 956 S.W.2d 883 (Ky. 1997), the techniques and instruments used by Napier were not novel and were generally accepted by the medical community, and 3) that Napier's proposed

testimony was not prejudicial. After the *Daubert* hearing, Napier testified before the jury, and this later testimony was consistent with her prior testimony.

After Napier's testimony, the Commonwealth called Misty Holbrook, a forensic biologist who worked at one of the Kentucky State Police's forensic laboratories. Holbrook testified that she examined the tank top that W.M. had worn on the night of the attack, and the biologist explained that she found semen stains on the tank top. Subsequently, the Commonwealth called Melissa Brown, one of the forensic scientist specialists who worked at the state police's laboratory in Frankfort. Brown testified that one of the semen stains found on W.M.'s tank top was in actuality a mixture of W.M.'s bodily fluid and semen. According to Brown, the DNA found in this mixture belonged to W.M. and Salyers.

After the Commonwealth presented its case-in-chief, Salyers declined to testify and presented no witnesses on his behalf. Before the trial court gave the jury its instructions, Salyers presented the court with instructions on rape in the third degree, sexual abuse in the first degree and sexual abuse in the third degree. Salyers argued that these felonies constituted lesser included offenses of rape in the first degree and insisted that the evidence supported an instruction on each one. However, the trial court disagreed with Salyers and rejected his proposed lesser included offense instructions.

After the trial court instructed the jurors, the jury deliberated and ultimately convicted Salyers of rape in the first degree. The trial court then sentenced Salyers to ten years of incarceration in the state penitentiary.

II. ANALYSIS

A. APPELLANT'S FIRST ASSIGNMENT OF ERROR

1. STANDARD OF REVIEW

Regarding expert testimony, if the trial court failed to make findings of fact then the

appellate court should engage in [a] clear error review by looking at the record to see if there is substantial evidence to support the trial court's ruling. And a review of the trial court's ruling as to whether the expert testimony would assist the trier of fact is then reviewed under the abuse of discretion standard.

Miller v. Eldridge, 146 S.W.3d 909, 917 (Ky. 2004).

2. THE SEXUAL ASSAULT NURSE EXAMINER'S EXPERT TESTIMONY

Regarding the admissibility of expert opinion evidence, the Supreme Court of Kentucky held that such evidence will be admissible if 1) the witness is qualified to render an opinion regarding the subject matter to which the witness will testify; 2) the subject matter to which the witness will testify satisfies the requirements set forth in *Daubert*; 3) the subject matter is relevant pursuant to KRE 401 and 403; and 4) the witness's opinion will help the trier of fact as contemplated by KRE 702. *Stringer*, 956 S.W.2d at 891.

According to Salyers, Napier was not qualified to testify regarding the tears she observed during her examination of W.M. because she only had a two-year degree

and forty hours of training. Pursuant to the holding in *Stringer*, for Napier's testimony to be admissible, she must have been qualified to render the opinions to which she testified. “Whether a witness is qualified as an expert is a factual determination and is reviewed for clear error.” *Meadows v. Commonwealth*, 178 S.W.3d 527, 535 (Ky. App. 2005). A trial court's finding of fact is not clearly erroneous if it is supported by substantial evidence. *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). The Supreme Court of Kentucky has defined “substantial evidence” as “evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men.” *Id.*

Turning to the evidence adduced at the *Daubert* hearing, we find that Napier testified that she graduated from a two-year nursing program and, more importantly, she attended forty hours of training in order to be certified by this Commonwealth as a sexual assault nurse examiner. As part of this forty hours of training, she learned to use both toluidine dye and the culpascope to examine patients for physical signs of sexual assault. According to KRE 702, a witness may be qualified as an expert through “knowledge, skill, experience, training, or education[.]” As can be seen, Napier testified regarding the training and education she underwent to become a certified sexual assault nurse examiner. This testimony constituted substantial evidence which supported the trial court decision. Thus, the trial court did not err when it found Napier qualified to testify as an expert.

Salyers also argues that Napier's testimony failed to address the requirements set forth in *Daubert*, 509 U.S. 579, 113 S. Ct. 2786. Salyers contends that Napier failed to establish a “nexus” between the tears she observed and any valid methodology, empirical testing, peer review or general acceptance. Thus, Salyers concludes that Napier's testimony did not meet any of the *Daubert* requirements.

For Napier's testimony to be admissible, *Stringer* requires that the subject matter meet the test set forth in *Daubert*. According to the Supreme Court of the United States, when considering the admissibility of expert testimony, a trial court must determine whether the subject matter to which the expert will testify is scientific knowledge and will assist the fact-finder to understand or resolve a fact in issue. *Daubert*, 509 U.S. at 593, 113 S. Ct. at 2796. To aid trial courts, the Supreme Court set forth a list of factors that trial courts should consider in determining the admissibility of expert testimony: 1) whether the theory or technique was based on scientific methodology; 2) whether the theory or technique has been subjected to peer review and publication; 3) the known or potential rate of error regarding the theory or technique; and 4) the degree of acceptance in the relevant scientific community. *Id.* at 593-594, 113 S. Ct. at 2796-2797.

Salyers labors under the misconception that proposed expert testimony must satisfy all of the factors set forth in *Daubert*. However, the *Daubert* Court stated clearly that the factors constituted neither a definitive checklist nor a test. *Daubert*, 509 U.S. at 593, 113 S. Ct. at 2796. In fact, the United States Supreme Court later explained

that the factors were only meant to be helpful, rather than definitive, and it recognized that not all of the factors would necessarily apply every time a party challenged the reliability of expert testimony. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 151, 119 S. Ct. 1167, 1175 (1999).

In other words, a court may consider one or more or all of the factors mentioned in *Daubert*, or even other relevant factors, in determining the admissibility of expert testimony. The test of reliability is flexible and the *Daubert* factors neither necessarily nor exclusively apply to all experts in every case.

Johnson v. Commonwealth, 12 S.W.3d 258, 264 (Ky. 1999) (citation omitted).

So, the trial court was not required to consider all of the *Daubert* factors nor was Napier required to testify regarding all those factors. Turning to the *Daubert* hearing, we observe that Napier testified that toluidine dye and culpascope were used nationwide in sexual assault cases, and we observe that the trial court, subsequently, found that the use of the toluidine dye with a culpascope was generally accepted by the medical community. As can be seen, the trial court considered one of the *Daubert* factors, the degree of acceptance in the relevant scientific community, and this was sufficient. Additionally, Napier's testimony constituted substantial evidence supporting this finding. Therefore, the trial court did not err regarding the reliability of Napier's testimony.

Lastly, Salyers challenges Napier's testimony because she did not couch her opinions in terms of reasonable medical probability. However,

[t]he seminal case on this issue, *Rogers v. Sullivan*, Ky.,

410 S.W.2d 624 (1966), does not require an expert medical witness to use the magic words “reasonable probability.” *Rogers* only holds that testimony so phrased satisfies the requirement that an issue requiring medical expertise be proven by “the positive and satisfactory type of evidence required to take the case to the jury on that question.” *Id.* at 628. In other words, the requirement of “reasonable probability” relates to the proponent's burden of proof, not to the admissibility of the testimony of a particular witness.

Turner v. Commonwealth, 5 S.W.3d 119, 122-123 (Ky. 1999). Pursuant to *Turner*, Napier was not required to couch her testimony in terms of reasonable medical probability; therefore, Salyers's argument is without merit.

B. APPELLANT'S SECOND ASSIGNMENT OF ERROR

1. STANDARD OF REVIEW

In the Commonwealth, trial courts are required to instruct the jury on the whole law of the case including “instructions applicable to every state of the case deducible or supported to any extent by the [evidence].” *Taylor v. Commonwealth*, 995 S.W.2d 355, 360 (Ky. 1999). Additionally, we consider any alleged errors regarding jury instructions to be questions of law; thus, we review such assignments of error *de novo*. *Hamilton v. CSX Transportation, Inc.*, 208 S.W.3d 272, 275 (Ky. App. 2006).

2. JURY INSTRUCTIONS REGARDING LESSER-INCLUDED OFFENSES

In addition with taking issue over Napier's testimony, Salyers argues that the trial court erred regarding the jury instructions. In his brief, Salyers argues that the jury's verdict clearly indicated a lack of forcible compulsion on his part. Based on this lack of forcible compulsion and the fact that W.M. had drunk seven beers on the night of

the rape, Salyers argues that the jury could have believed that he merely had sexual contact with W.M. instead of penetrating her, or the jury could have believed that he had consensual contact with W.M. Thus, he concludes that the trial court should have instructed on third-degree rape, first-degree sexual abuse and third-degree sexual abuse as lesser included offenses of rape in the first degree.

The elements of first-degree rape, as it applied to this case, are found in KRS 510.040, and that statute reads “[a] person is guilty of rape in the first degree when . . . [h]e engages in sexual intercourse with another person who is incapable of consent because he . . . [i]s physically helpless[.]” Kentucky Revised Statute 510.060 sets forth the elements of rape in the third degree, as that offense would apply to this case, and, according to that statute, “[a] person is guilty of rape in the third degree when . . . [b]eing twenty-one (21) years old or more, he or she engages in sexual intercourse with another person less than sixteen (16) years old[.]” The elements of sexual abuse in the first degree, as that offense would apply to this case, are found in KRS 510.110, and that reads “[a] person is guilty of sexual abuse in the first degree when: . . . [h]e or she subjects another person to sexual contact who is incapable of consent because he or she . . . [i]s physically helpless[.]” Moreover, KRS 510.130 sets forth the elements of sexual abuse in the third degree, as that statute would apply in this case, and that statute reads “[a] person is guilty of sexual abuse in the third degree when . . . [h]e subjects another person to sexual contact without the latter's consent.”

According to the commentary following the first-degree rape instruction found in *Cooper's Kentucky Instructions to Juries*,

[s]exual intercourse with or without forcible compulsion with a physically helpless victim is a Class B felony.

...

If there is evidence that sexual intercourse did not occur, an instruction on First-Degree Sexual Abuse should be given as a lesser included offense. If there is evidence that the victim was not physically helpless, but was less than sixteen years of age, instructions on Second-Degree Rape and Third-Degree Rape, as well as Second and Third-Degree Sexual Abuse could be lesser included offenses.

1 WILLIAM S. COOPER, KENTUCKY INSTRUCTIONS TO JURIES, § 4.25-4.27 (Revised 4th ed. 1999).

So, for Salyers to be entitled to an instruction regarding third-degree rape, as a lesser included offense of first-degree rape, the evidence adduced at trial would have to have demonstrated that sexual intercourse occurred, that W.M. was not physically helpless and that her lack of consent was due solely to the fact that she was less than sixteen years old. However, the uncontroverted evidence adduced at trial demonstrated that W.M. was physically helpless due to intoxication and that she did not consent to the sexual intercourse. Furthermore, at trial, Salyers's defense was that W.M. fabricated the assault. In fact, his counsel argued that Salyers never had sexual contact with W.M. Given the lack of evidence to support his theory regarding third degree rape, we find, the trial court properly refused to instruct on this offense.

For Salyers to be entitled to an instruction for sexual abuse in the first degree, the evidence would have to have shown that sexual contact occurred but no

sexual intercourse, i.e., penetration, occurred. However, W.M. testified unequivocally that Salyers penetrated her, and this testimony was uncontroverted. Given that the evidence did not support first-degree sexual abuse, the trial court properly rejected Salyers's proposed instruction on that offense.

For Salyers to be entitled to an instruction for sexual abuse in the third degree, the evidence would have to have established that W.M. was not physically helpless, that her lack of consent was due solely to her age and that Salyers subjected her to sexual contact but not sexual intercourse. However, as previously discussed, the uncontroverted evidence adduced at trial was that Salyers engaged in sexual intercourse with W.M. while she was physically helpless. Therefore, the trial court acted properly when it refused to instruct the jury regarding third-degree sexual abuse.

III. CONCLUSION

Because the Greenup Circuit Court did not err regarding the expert testimony nor the jury instructions, we affirm Charles Salyers's judgment of conviction.

ALL CONCUR.

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